JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)
16 April 1997 *

In Case T-554/93,

Alfred Thomas Edward Saint and Christopher Murray, residing at Penrhos, Gwent (United Kingdom) and at Naas, Kildare (Ireland) respectively,

represented by Erik H. Pijnacker Hordijk, of the Amsterdam Bar, and Hendrik J. Bronkhorst, Advocaat with rights of audience before the Hoge Raad der Nederlanden, instructed by Burges Salmon, Solicitors, with an address for service in Luxembourg at the Chambers of Luc Frieden, 62 Avenue Guillaume,

applicants,

v

Council of the European Union, represented by Arthur Brautigam, Legal Adviser, and Michael Bishop, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Bruno Eynard, Director General of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

and

* Language of the case: English.

Commission of the European Communities, represented initially by Gérard Rozet, Legal Adviser, and Xavier Lewis, of its Legal Service, subsequently by Mr Rozet and Christopher Docksey, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Goméz de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendants,

APPLICATION for annulment, pursuant to Article 173 of the EEC Treaty, of Article 8(2)(a) and the fourth paragraph of Article 14 of Council Regulation (EEC) No 2187/93 of 22 July 1993 providing for an offer of compensation to certain producers of milk and milk products temporarily prevented from carrying on their trade (OJ 1993 L 196, p. 6), and application for compensation, pursuant to Articles 178 and 215 of the EEC Treaty, for the losses sustained by the applicants owing to the fact that they were prevented from marketing milk as a result of Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector (OJ 1984 L 90, p. 13), as supplemented by Commission Regulation (EEC) No 1371/84 of 16 May 1984 (OJ 1984 L 132, p. 11),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(First Chamber, Extended Composition),

composed of: A. Saggio, President, C. W. Bellamy, A. Kalogeropoulos, V. Tiili and R. M. Moura Ramos, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 21 May 1996,

gives the following

Judgment

Facts and relevant legislation

1 In 1977, in order to cut back surplus milk production in the Community, the Council adopted Regulation (EEC) No 1078/77 of 17 May 1977 introducing a system of premiums for the non-marketing of milk and milk products and for the conversion of dairy herds (OJ 1977 L 131, p. 1). Under that regulation, producers had the opportunity to enter into an undertaking not to market milk or to convert their herds for five years in return for payment of a premium.

2 The applicants, milk producers in the United Kingdom and Ireland respectively, entered into such undertakings. The undertakings came to an end on 11 March 1984 and 13 May 1985 respectively.

3 In 1984, in order to cope with persistent overproduction, the Council adopted Regulation (EEC) No 856/84 of 31 March 1984 (OJ 1984 L 90, p. 10), amending Regulation (EEC) No 804/68 of the Council of 27 June 1968 establishing a common organization of the market in milk and milk products (OJ, English Special Edition 1968(I), p. 176). The new Article 5c of the latter regulation introduced an 'additional levy' on milk delivered by producers in excess of a 'reference quantity'.

4 Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector (OJ 1984 L 90, p. 13; 'Regulation No 857/84') fixed the reference quantity for each producer on the basis of production delivered during a reference year, namely the 1981 calendar year, subject to the Member States' opting for the 1982 or 1983 calendar year. That regulation was supplemented by Commission Regulation (EEC) No 1371/84 of 16 May 1984 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 (OJ 1984 L 132, p. 11; 'Regulation No 1371/84').

5 The non-marketing or conversion undertakings entered into by the applicants covered those reference years. Since they had produced no milk in those years, they were ineligible for a reference quantity and, as a result, unable to market any quantity of milk exempt from additional levy.

6 By judgments of 28 April 1988 in Case 120/86 *Mulder* v *Minister van Landbouw en Visserij* [1988] ECR 2321 and Case 170/86 *Von Deetzen* v *Hauptzollamt Hamburg-Jonas* [1988] ECR 2355, the Court of Justice declared invalid Regulation No 857/84, as supplemented by Regulation No 1371/84, on the ground that it infringed the principle of protection of legitimate expectations.

7 In order to comply with those judgments, the Council adopted Regulation (EEC) No 764/89 of 20 March 1989 amending Regulation (EEC) No 857/84 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector (OJ 1989 L 84, p. 2; 'Regulation No 764/89'). Pursuant to that amending regulation, producers who had entered into non-marketing or conversion undertakings received a reference quantity known as a 'special' reference quantity (or 'quota'). Such producers are referred to as 'SLOM I producers'.

8 Allocation of a special reference quantity was subject to several conditions. Some of those conditions were declared invalid by the Court of Justice by judgments of 11 December 1990 in Case C-189/89 *Spagl* [1990] ECR I-4539 and Case C-217/89 *Pastätter* [1990] ECR I-4585.

9 Following those judgments, the Council adopted Regulation (EEC) No 1639/91 of 13 June 1991 amending Regulation (EEC) No 857/84 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector (OJ 1991 L 150, p. 35; 'Regulation No 1639/91'), which granted the producers concerned a special reference quantity. Such producers are referred to as 'SLOM II producers'.

10 In the meantime, one of the producers who had brought the action resulting in Regulation No 857/84 being declared invalid had instituted proceedings, together with other producers, against the Council and the Commission in which they sought compensation for the losses which they had sustained on account of their not having been granted a reference quantity under that regulation.

11 By judgment of 19 May 1992 in Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, hereinafter '*Mulder II*', the Court of Justice held that the Community was liable for the damage in question. It gave the parties one year to reach agreement on the amount of compensation. Since the parties were unable to come to an agreement, the proceedings were reopened in order to enable the Court of Justice to lay down the criteria for quantifying the loss in a judgment which would bring the proceedings to a close.

12 The effect of the judgment in *Mulder II* is that all producers who were prevented from producing milk solely because they had entered into a non-marketing or a conversion undertaking are, in principle, entitled to compensation for the damage sustained.

13 In view of the large number of producers affected and the difficulty in negotiating individual settlements, the Council and the Commission published on 5 August 1992 Communication 92/C 198/04 (OJ 1992 C 198, p. 4; hereinafter 'the Communication' or 'the Communication of 5 August'). After setting out the implications of the judgment in *Mulder II*, the institutions stated their intention to adopt practical arrangements for compensating the producers concerned in order to give full effect to that judgment. Until such time as those arrangements were adopted, the institutions undertook not to plead against any producer entitled to compensation that entitlement to claim was barred by lapse of time under Article 43 of the Statute (EEC) of the Court of Justice. However, that undertaking was made subject to the proviso that entitlement to compensation had not already been barred on grounds of time on the date of publication of the Communication or on the date when the producer had applied to one of the institutions. Lastly, the institutions assured producers that the fact that they did not make an approach to them as from the date of the Communication and until such time as the practical arrangements for compensation were adopted would not adversely affect them.

14 Following the Communication of 5 August, the Council adopted Regulation (EEC) No 2187/93 of 22 July 1993 providing for an offer of compensation to certain producers of milk and milk products temporarily prevented from carrying on their trade (OJ 1993 L 196, p. 6; 'Regulation No 2187/93'). The regulation provided for an offer of flat-rate compensation to producers who had received special reference quantities under the terms laid down by Regulations Nos 764/89 and 1639/91.

15 Article 8 of Regulation No 2187/93 provides that compensation is to be granted only for the period for which the right to compensation is not time-barred. The date of interruption of the five-year limitation period set by Article 43 of the Statute of the Court of Justice is to be the date of the application addressed to a Community institution or the date of registration of an application brought before the Court of Justice or, at the latest, 5 August 1992, the date on which the aforementioned Communication was published [Article 8(2)(a)]. The starting date of the compensation is to be five years before the date of interruption of the limitation period and the closing date the date when the producer received a special reference quantity pursuant to Regulations Nos 764/89 and 1639/91.

16 Under the fourth paragraph of Article 14 of Regulation No 2187/93, acceptance of the offer is to imply relinquishment of any claim whatsoever against Community institutions in respect of the loss at issue.

Procedure and forms of order sought by the parties

17 By application lodged at the Registry of the Court of First Instance on 29 October 1993, Mary Aharn and 588 other applicants, including Alfred Thomas Edward Saint and Christopher Murray, sought annulment of Article 8(2)(a) and the fourth paragraph of Article 14 of Regulation No 2187/93, together with damages from the Community for the losses sustained because they were prevented from carrying on their trade as a result of Regulation No 857/84, as supplemented by Regulation No 1371/84.

18 On 22 December 1993, Abbott Trust and 314 other applicants in this case made an interlocutory application for interim measures by which they sought suspension of operation of the third paragraph of Article 14 of Regulation No 2187/93 for the later of either the three weeks following the date of delivery of an order to be given in Case T-555/93 R *Jones and Others* v *Council and Commission*, in which an order was sought suspending the operation of Regulation No 2187/93, in particular Article 8 and the fourth paragraph of Article 14, or the two months following receipt of the offer of compensation provided for by that regulation. By order of 12 January 1994 in Case T-554/93 R *Abbott Trust and Others* v *Council and Commission* [1994] ECR II-1, the judge hearing applications for interim measures upheld that application. The interlocutory proceedings in Case T-555/93 R closed when, by order of 1 February 1994 in Joined Cases T-278/93 R and T-555/93 R, T-280/93 R and T-541/93 R *Jones and Others* v *Council and Commission* [1994] ECR II-11, the President of the Court of First Instance refused the application.

19 On 27 and 25 January 1994, respectively, the national authorities sent Mr Saint and Mr Murray, in the name and on behalf of the Council and the Commission, offers of compensation pursuant to Regulation No 2187/93.

20 By order of 30 August 1994, the Commission, which is a defendant only to the claim for compensation, was given leave to intervene in the proceedings for annulment in support of the form of order sought by the Council.

21 Since all the applicants, with the exception of Mr Saint and Mr Murray, withdrew, the case was removed from the register as far as the former were concerned by orders of 8 June (586 applicants) and 10 November 1995 (1 applicant).

22 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber, Extended Composition) decided to open the oral procedure without any preparatory measures of inquiry. The parties were heard at the hearing on 21 May 1996.

23 The applicants claim that the Court should:

— annul Article 8(2)(a) and the fourth paragraph of Article 14 of Regulation No 2187/93;

— order the Community to pay compensation of ECU 18 403 to Mr Saint and ECU 9 342.497 to Mr Murray, together with interest at 8% per annum from 19 May 1992, calculated in accordance with the method laid down by Articles 6 and 11 of Regulation No 2187/93 applied to the whole of the period during which they were prevented from marketing milk;

— in the alternative, order the Community to pay Mr Saint ECU 6 658 and Mr Murray ECU 4 306.626 by way of compensation calculated in accordance with Regulation No 2187/93 in respect of the only period envisaged thereby;

— order the defendants to pay the costs.

24 The Council, as defendant, claims that the Court should:

— dismiss the applications for annulment and compensation as inadmissible or, in the alternative, as unfounded;

— order the applicants to pay the costs.

25 The Commission, as intervener supporting the form of order sought by the Council in the annulment proceedings and as defendant to the application for compensation, claims that the Court should:

— dismiss the applications for annulment and compensation as inadmissible or, in the alternative, as unfounded;

— order the applicants to pay the costs.

The claim for annulment

26 The applicants rely on three pleas in support of their claim for annulment: infringement of Article 43 of the Statute of the Court of Justice, infringement of the principle of protection of legitimate expectations and infringement of the principle of equal treatment.

27 The Council, supported by the Commission, intervening, objects that the claims for annulment are inadmissible and, in any event, contests the pleas raised.

Admissibility

28 The Council raises two pleas as to inadmissibility. In its first plea, it alleges that the applicants are not individually and directly concerned by Regulation No 2187/93. In its second, it submits that the regulation is not open to legal challenge by the producers as addressees of an offer of compensation.

29 In its statement in intervention, the Commission supports the form of order sought by the Council, yet without adding any pleas of its own.

30 The Court finds that it should first consider the second plea alleging inadmissibility, since the effects of the contested measure should logically be appraised before the question whether the measure is of direct and individual concern to the applicants.

The effects of the contested measure

— Arguments of the parties

31 The Council, supported by the Commission, maintains that Regulation No 2187/93 is not amenable to judicial review. The regulation has no binding effects, since it does not change producers' legal position without their consent.

32 The Commission adds that the solution of making a non-binding offer in settlement to SLOM producers by means of a regulation was chosen because of the

difficulty in negotiating an individual settlement with each producer. Referring to the order of the Court of Justice of 17 May 1989 in Case 151/88 *Italy* v *Commission* [1989] ECR 1255 and the judgment of the Court of First Instance in Case T-116/89 *Prodifarma and Others* v *Commission* [1990] ECR II-843, it states that there is no legal obligation to accept the offer, which, as long as it is not accepted, has no effect on the pursuit of actions already commenced.

33 The elements of the offer are the same as those which might have appeared in an offer of settlement made by the Community directly to each producer. The regulation is merely the vehicle for the offer. It only indicates the method the Community has undertaken to follow if the offer is accepted (order of the Court of Justice of 8 March 1991 in Cases C-66/91 and C-66/91 R *Emerald Meats* v *Commission* [1991] ECR I-1143). The form of a regulation was chosen because it guarantees the serious nature of the institutions' offer. The only binding provisions of the regulation — relating to the authorities competent to act on behalf of the Community and to the pecuniary consequences of accepting the offer — are not concerned by this action.

34 In conclusion, the Commission states that, according to the case-law (Case 22/70 *Commission* v *Council* [1971] ECR 263), it is not the form of an act but its content which determines whether it is open to challenge. Analysis of Regulation No 2187/93 shows that the offer contained in its provisions is no different from any offer of settlement made directly to a producer by an institution. Since the terms of such an offer would not be open to challenge, the same is true of the provisions of the regulation, which are identical in nature.

35 The applicants maintain that, in the circumstances, most SLOM producers have no option but to accept the offer made in Regulation No 2187/93. The Commission itself has admitted that an action will lie against a regulation if it imposes a binding arrangement without the slightest possibility of choice. In those circumstances the application is admissible.

— Findings of the Court

36 Only measures which produce binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position may be the subject of an action for annulment (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9; orders of 30 November 1992 in Case T-36/92 *SFEI and Others* v *Commission* [1992] ECR II-2479, paragraph 38, and of 21 October 1993 in Cases T-492/93 and T-492/93 R *Nutral* v *Commission* [1993] ECR II-1023, paragraph 24; Case T-154/94 *Comité des Salines de France and Compagnie des Salins du Midi et des Salines de l'Est* v *Commission* [1996] ECR II-1377, paragraph 37).

37 It is clear from the fourth recital in the preamble to Regulation No 2187/93 and from Articles 1, 8 and 14 read together that the regulation introduces a system of offers of compensation for SLOM I and SLOM II producers. Indeed, the fourth recital and Articles 8 and 14 use the term 'offer', the words 'compensation shall be granted only [...]' and 'compensation shall be offered' and the expression 'offer of compensation'. It also appears from the fourth recital and, in particular, Article 11 of the contested regulation that the offers are made on a flat-rate basis inasmuch as the amount is to be calculated without taking account of losses actually sustained or the details of each producer's situation. Producers have two months in which to accept the offer. Acceptance of the offer implies relinquishment of any claim against the institutions in respect of any loss (fourth paragraph of Article 14). In contrast, if the offer is refused, the Community institutions are not bound thereby in the future (third paragraph of Article 14 of the regulation), and producers are not precluded from bringing an action for damages against the Community.

38 Therefore, as the Council states, Regulation No 2187/93 is confined to providing for an offer of compensation to be made for the period fixed in Article 8 to milk producers who sustained loss as a result of the application of Regulation No 857/84. More specifically, under the rules governing that flat-rate offer, producers may apply for an offer of compensation and have two months in which to accept

it. It is inherent in the offer that certain consequences attach to accepting it, in so far as acceptance implies relinquishment of any claim against the institutions. Nevertheless, it is left to producers to decide whether to opt to accept it.

39 In the event that a producer does not accept the offer, he remains in exactly the same position as if the regulation in question had not been adopted, in so far as he retains the right to bring an action for damages under Articles 178 and 215 of the EC Treaty.

40 It therefore appears from the content of the contested regulation that the Council has in fact opened up an additional avenue for compensation to producers entitled to compensation. As has been mentioned, producers could already avail themselves of an action for damages under Articles 178 and 215 of the Treaty. Since the sheer numbers of producers involved (see paragraph 13 of this judgment) meant, according to the preamble to Regulation No 2187/93, that each individual situation could not be taken into account, the contested measure gives them an opportunity to obtain the compensation to which they are entitled without bringing an action for damages.

41 Accordingly, as far as producers are concerned, Regulation No 2187/93 is in the nature of a proposal by way of settlement, acceptance of which is optional, and constitutes an alternative to judicial resolution of the dispute. The legal situation of the producers concerned is not adversely affected in so far as the contested measure does not restrict their rights. On the contrary, it simply opens up an additional avenue for obtaining compensation.

42 As for Articles 8 and 14 of Regulation No 2187/93, whose annulment is more specifically sought by the applicants, they merely prescribe the period for which the offer of compensation is open and determine the consequences of accepting the offer. Since acceptance is optional, whether those provisions have any effects remains subject to the will of each producer to whom an offer of settlement is made.

43 In those circumstances and having regard to what has been held with regard to measures reflecting only an intention on the part of an institution (Case 114/86 *United Kingdom* v *Commission* [1988] ECR 5289, paragraphs 12 and 13), the Court considers that, in so far as Regulation No 2187/93 provides for an offer addressed to producers, it is not a measure amenable to challenge by producers in an action for annulment.

44 It should be added that, apart from the offer of compensation and the conditions to which it is subject, Regulation No 2187/93 has no legal effect with regard to producers. All the provisions of the regulation which do not deal with the offer of compensation and its conditions apply only to the national authorities.

45 Consequently, the claims for annulment must be dismissed as inadmissible without there being any need to consider the first plea as to inadmissibility.

The claims for compensation

46 The applicants' principal claim is that the Community should be ordered, under Article 215 of the Treaty, to compensate them for the losses that they have allegedly sustained. Those losses are calculated, on the basis of the calculation method laid down by Regulation No 2187/93, for the whole of the period for which they were prevented from producing and not just for the period contemplated by that regulation. Mr Saint claims compensation of ECU 18 403 and Mr Murray ECU 9 342.497, with interest at 8% per annum as from the date of delivery of the judgment in *Mulder II*.

47 In the alternative, the applicants ask that the Community be ordered to pay the compensation which would arise from the application of Regulation No 2187/93, as it was adopted.

48 The institutions object that the damages claims are inadmissible.

49 In the reply, Mr Saint amends the amount of compensation claimed on the ground of an error made in applying calculation items set out in Regulation No 2187/93. He increases his principal claim to ECU 30 686 and his alternative claim to UK £12 052.12. For his part, Mr Murray increases his alternative claim to IR £4 724.27.

50 On the basis of experts' reports, the two applicants aver that their real losses exceed the compensation claimed. Mr Saint's losses amount to UK £43 301 and Mr Murray's to IR £17 781.

Admissibility

— Arguments of the parties

51 The Council maintains that the damages claims are inadmissible on the ground that they do not comply with the requirements of the Rules of Procedure. In an action for damages, applicants must give particulars in their application of the amount of the damage sustained and adduce evidence to that effect. In this case, the applicants should have also provided details of the alternative income which they earned during the period for which they were prevented from producing milk.

52 The Commission submits that the applicants had to demonstrate that there was a causal link between the act of the institutions and the damage sustained. They have merely indicated particulars based on Regulation No 2187/93. Their claims are inadmissible (Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, paragraphs 73 to 76), particularly since they have not indicated any special circumstances which prevented the damage actually sustained from being quantified. In addition, the amounts of the losses alleged in the reply are based on the applicants' own calculations, who, moreover, have not given any details of the method followed.

53 The applicants contest the plea of inadmissibility raised by the Council and the Commission. In their view, the application complies with the requirements of Article 44 of the Rules of Procedure in that it contains a summary of the pleas in law on which it is based. They have produced new evidence, including experts' reports, in support of their statement in reply.

— Findings of the Court

54 Under Article 44(1)(c) of the Rules of Procedure, the application must set out the subject-matter of the proceedings and a summary of the pleas in law on which the application is based.

55 In the present case, the question whether the application satisfies the requirements set out in that provision cannot be resolved outside the specific framework of the milk quotas litigation. By the application, compensation is sought for the losses sustained by the applicants as milk producers as a result of the application of Regulation No 857/84.

56 It appears from the materials making up the case-file that the applicants received offers of compensation in the course of the proceedings from the competent national authorities, dated 27 and 25 January 1994, in the name and on behalf

of the Council and the Commission, pursuant to Regulation No 2187/93. The Community seeks by that act to compensate producers fulfilling the conditions laid down in *Mulder II* (see paragraphs 13 and 14 of this judgment). Consequently, at this stage in the reasoning and without prejudging the applicability of the regulation in question in accordance with the methods indicated by the applicants, which goes to the substance, it must be held that the institutions have recognized that the applicants fulfil the conditions laid down by the regulation, that is to say, damage resulting from the fact that the Community unlawfully prevented them from delivering milk.

57 In this context, the fact that the application alleges damage attributable to an act of the institutions is sufficient to satisfy the requirements of the Rules of Procedure, having regard to the offer of compensation made to the applicants in the name and on behalf of the defendants. Moreover, the succinctness of the application has not prevented the Council and the Commission from defending their interests effectively.

58 In the same connection, the pleas in law relied upon may be set out very summarily in the application, provided that the applicant, as in this case (see paragraph 101 below), provides all appropriate particulars in the course of the procedure (Case 74/74 *CNTA* v *Commission* [1975] ECR 533, paragraph 4), for instance by means of experts' reports.

59 It follows that in this case the application contains sufficient particulars to satisfy the requirements of the Rules of Procedure and that the damages claims are admissible.

60 Consequently, in the light of the applicants' principal and alternative claims, the questions of the existence and extent of any right to compensation pursuant to Article 215 of the Treaty should be considered in turn, followed by the question of the existence of any right to compensation based specifically on Regulation No 2187/93 and, finally, the matter of the quantum of damages.

Existence and extent of any right to compensation pursuant to Article 215 of the Treaty

Existence of any right to compensation

61 The applicants rely on losses sustained throughout the period when they were prevented from marketing milk as a result of Regulation No 857/84.

62 The defendants contest whether the losses claimed were genuinely sustained.

63 As regards the damages claims, the Court finds that it appears from *Mulder II* that the Community incurred liability *vis-à-vis* each producer who suffered reparable injury owing to their having been prevented from delivering milk as a result of the application of Regulation No 857/84, as the institutions acknowledged in their Communication of 5 August (paragraphs 1 and 3).

64 In the light of the documents exhibited to the Court, which the defendants have not challenged, the applicants are in the situation of producers referred to in that Communication. Since they had entered into non-marketing undertakings pursuant to Regulation No 1078/77, they were prevented, as a result of Regulation No 857/84, from resuming the marketing of milk when those undertakings expired.

65 Moreover, on 27 and 25 January 1994, the competent national authorities made them offers of compensation for the damage sustained, in the name and on behalf of the Council and the Commission, pursuant to Regulation No 2187/93.

66 In those circumstances, the applicants are entitled to compensation from the defendants for their losses.

67 However, in order to quantify the amount of damages, the extent of the right to compensation needs to be determined, especially the period for which compensation is payable. It must therefore be considered whether and to what extent the applicants' claims are time barred. To that end, the Court will consider the arguments put forward by the parties in this connection in connection with the claims for annulment.

Limitation

— Arguments of the parties

68 The applicants submit that for the purposes of Article 43 of the Statute of the Court of Justice time did not start to run until after 28 April 1988, the date when judgment was given in *Mulder I*, declaring Regulation No 857/84 invalid. As a result, their claims are not time barred.

69 They rely on case-law of the Court of Justice (in particular, Joined Cases 256/80, 257/80, 265/80, 267/80 and 5/81 *Birra Wührer and Others* v *Council and Commission* [1982] ECR 85, '*Birra Wührer I*', and Joined Cases 256/80, 257/80, 265/80, 267/80, 5/81, 51/81 and 282/82 *Birra Wührer and Others* v *Council and Commission* [1984] ECR 3693, '*Birra Wührer II*') according to which, in principle, the limitation period cannot begin before all the requirements governing the obligation to provide compensation for damage are satisfied. They argue, however, that that case-law does not exclude the possibility of the limitation period starting after the damage arose. Moreover, they maintain that more recent case-law of the Court of Justice shows that, in certain circumstances, the starting point of the limitation period may be well after the damage has materialized. In Case 145/83 *Adams* v

Commission [1985] ECR 3539 ('*Adams*'), the Court of Justice held that expiry of the limitation period cannot be a defence to a person's claim where he only belatedly became aware of the event giving rise to the damage and thus could not have submitted his application before the expiry of the limitation period.

70 The applicants argue that it must be presumed that a Community regulation, such as the one which prevented SLOM producers from resuming milk production, is legal and binding so long as the Court of Justice has not declared it invalid. Consequently, all the requirements governing the obligation to provide compensation for any damage were not satisfied until the date of the judgment in *Mulder I*. Until that date, persons who incurred losses as a result of the illegality of Regulation No 857/84 could not have been aware that the criteria enabling them to bring an action for damages against the Community were satisfied.

71 The applicants consider that the Council cannot counter this argument by pleading the retroactive effects produced by the judgment in *Mulder I* to the date when Regulation No 857/84 entered into force. They point out that, notwithstanding the *ex tunc* effect of that judgment, the Council had to adopt a regulation in order to comply with it and that it did not do so until a year later.

72 The applicants argue that the defendants cannot claim that producers should have brought actions in order to interrupt the limitation period. They did not do so solely in reliance on the institutions, which, by not claiming that Mr Heinemann's application was time barred in *Mulder II*, led them to believe that the institutions had waived that defence.

73 The Council maintains that, in *Birra Wührer II* (paragraph 22), the Court of Justice stated that the limitation period cannot start on the date on which the act which rectified the illegality of an earlier act entered into force. It follows that the date argued for by the applicants, that of the judgment in *Mulder I*, must likewise be ruled out. That date is in fact only a variation on the date of entry into force of the regulations which rectified the illegality of Regulation No 857/84. It is settled

case-law (Joined Cases 66/79, 127/79 and 128/79 *Salumi* [1980] ECR 1237) that a ruling pursuant to Article 177 of the Treaty, such as *Mulder I*, clarifies the legal position as from the date of entry into force of the Community act in question and not only as from the date of the judgment. Consequently, as from the date of entry into force of Regulation No 857/84, it was unlawful not to allocate reference quantities to the producers concerned.

74 The Council asserts that the present situation is very different from that to which the *Adams* judgment refers. In that case, the applicant was not aware of the real cause of his misfortunes until several years after he suffered them, by which time the normal limitation period had expired. By contrast, in this case the applicants were aware from the date when their non-marketing undertakings expired that they were prevented from producing milk. From that time they were aware of the cause of that situation: the fact that Regulation No 857/84 did not provide them with any entitlement to a reference quota.

75 The Council avers that it did not raise the issue of limitation against Heinemann in *Mulder II* because that applicant had interrupted the limitation period by sending a letter to the institutions before he brought his action.

76 In conclusion, the Council claims that the applicants' action is time barred as regards damage sustained before 5 August 1987, that is, more than five years before the Communication of 5 August.

77 In the Commission's contention, the applicants could have brought an action as soon as they were refused a reference quantity. In view of the independent nature of an action for damages, they would have been entitled to bring such an action without having to show that the legislation concerned was invalid (*CNTA* v *Commission*, cited above, Case 90/78 *Granaria* v *Council and Commission* [1979] ECR 1081 and Joined Cases 241/78, 242/78 and 245/78 to 250/78 *DGV and Others* v *Council and Commission* [1979] ECR 3017). The Commission contests the applicants' assertion that before Regulation No 857/84 was declared invalid,

producers were unaware that they could bring an action for damages. It claims that, to apply the applicants' logic, there would never be any actions unless some public authority had acted first to obtain a declaration that the act which caused the damage was invalid. It is settled law that whether an action for damages will lie does not depend on the existence of a declaration of illegality (Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975). The producers should have been vigilant to protect their rights. The applicants hesitated in the face of the risks of litigation and the price of that hesitation is the running of time.

— Findings of the Court

78 In order to determine to what extent the claims are time barred, it is necessary first to fix the date on which the damage materialized, before determining the date on which any act interrupting the limitation period occurred.

79 The limitation period laid down by Article 43 of the Statute of the Court of Justice cannot begin before all the requirements governing the obligation to make good the damage are satisfied (*Birra Wührer I*, paragraph 10).

80 The Court has already found that those requirements are satisfied as far as the applicants are concerned (paragraph 66 of this judgment).

81 Contrary to the applicants' assertions, a declaration that Regulation No 857/84 was invalid was not among the requirements governing the obligation to make good the damage. Since actions for damages under the second paragraph of Article 215 of the Treaty are independent of actions for annulment, it was likewise unnecessary for there to have been a finding that the act which gave rise to the damage was unlawful before an action for damages could be brought.

82 In this case, the damage sustained by the applicants was directly caused by a legislative act, namely Regulation No 857/84. Consequently, it arose on the date when, following the expiry of their non-marketing undertakings, the applicants would have been able to resume milk deliveries if they had not been refused reference quantities. It is on that date that the requirements for an action for damages against the Community were satisfied.

83 There is no foundation to the applicants' argument that, despite the *ex tunc* effect of the judgment declaring Regulation No 857/84 invalid, the Council had to adopt a measure into order to give effect to it. That measure was concerned only with the resumption of milk production. It has nothing to do with the question of compensating producers.

84 The judgment in *Adams* cannot be usefully relied on in so far as the facts of that case were different. The applicant in the *Adams* case had suffered damage which he was reasonably entitled to consider a third party had caused and which had arisen in circumstances such that he could be presumed not to suspect any liability on the part of the Community. In such a context, account has indeed to be taken of the time when the applicant became aware of the event which caused the damage. Consequently, the Court of Justice held that expiry of the limitation period cannot constitute a valid defence to a claim by a person who has suffered damage where that person only belatedly became aware of the event giving rise to it and could not have had a reasonable time in which to react thereto (*Adams*, paragraph 50).

85 Furthermore, as the Council and the Commission have observed, it does not follow from the judgment in *Adams* that time under the limitation period does not start to run until the person who suffered the damage has become aware of the illegality of the act. What the Court of Justice emphasized is the importance of awareness of the event which gave rise to the damage and not of its illegality. In this case, however, the applicants could have been in no doubt at the time when they were prevented from marketing milk that that situation was the consequence of the application of a legislative measure, Regulation No 857/84.

86 Lastly, it does not avail the applicants to argue that the Council did not rely on limitation against the applicant Heinemann in *Mulder II*. In that case, as the Council has pointed out, the applicant in question had previously stopped time running under the limitation period by sending a letter to the institutions.

87 In those circumstances, time under the limitation period started to run on the date when, following the expiry of their non-marketing undertakings, the applicants were prevented from resuming milk deliveries because they had been refused reference quantities. That date, which is the starting point of the limitation period, is, in the case of Mr Saint, 1 April 1984, that is to say, the date when Regulation No 857/84 entered into force, an event which occurred after Mr Saint's non-marketing undertaking expired. As for Mr Murray, the corresponding date is 14 May 1985, that is to say, the day after his undertaking expired.

88 For the purposes of determining the period to which the time bar applies, it must be noted that the damage which the Community must make good was not caused instantaneously. The damage continued for a period, that is to say, for so long as the applicants were unable to obtain a reference quantity and, as a result, to deliver milk. The damage was continuous and recurred on a daily basis. Consequently, entitlement to compensation relates to successive periods starting each day when it was impossible to market milk. As a result, with respect to the date of the event which interrupted the limitation period, the time bar under Article 43 of the Statute of the Court of Justice applies to the period preceding that date by more than five years and does not affect rights which arose during subsequent periods.

89 It follows from the foregoing that, in order to determine to what extent the applicants' rights are time barred, it is necessary to fix the date on which the limitation period was interrupted.

90 Under Article 43 of the Statute of the Court of Justice, the applicants interrupted the limitation period on 29 October 1993, which is the date when they brought

their action. Nevertheless, by their Communication of 5 August (paragraphs 2 and 3), following on from the Court of Justice's recognition of producers' right to compensation (see paragraph 13 of this judgment), the defendant institutions undertook, *vis-à-vis* producers who had suffered damage as a result of the application of Regulation No 857/84, not to plead limitation under Article 43 of the Statute of the Court of Justice until the end of the period for lodging applications for compensation, for which practical arrangements were to be adopted at a later date.

91 Those practical arrangements were adopted by means of Regulation No 2187/93. Under the second subparagraph of Article 10(2) of that regulation, the institutions' self-imposed restriction of their right to plead limitation came to an end on 30 September 1993 as regards producers who had not made an application for compensation under that regulation. It follows from the system of the regulation that, in the case of producers who had made such an application, the self-imposed restriction ended at the end of the period for accepting the offer made pursuant to the application.

92 In this case, the applicants submitted applications for compensation under Regulation No 2187/93 before 30 September 1993, but brought their action on 29 October 1993, even before an offer had been made to them. Since the event which caused time to stop running therefore occurred in October 1993, the institutions are not entitled to plead limitation in respect of the period after 5 August 1992. In those circumstances, as appears moreover from the Council's reasoning, it is the latter date and not the date of the event which caused time to stop running which must be used in order to determine the period which may give rise to compensation.

93 That period is the five years preceding 5 August 1992 (see, to this effect, *Birra Wührer II*, paragraph 16). However, the period in respect of which compensation should actually be granted is limited to the period between 5 August 1987 and 28 March 1989, which was the day before the entry into force of Regulation No 764/89, which put an end to the damage sustained by SLOM I producers by enabling them thereafter to be allocated special reference quantities.

94 Consequently, the applicants' claims are time barred in respect of the period prior to 5 August 1987.

Existence of any right to compensation based on Regulation No 2187/93

95 In support of their alternative claims, the applicants argue that the principle of good faith requires that, in any event, they should not forfeit their rights to the compensation provided for by Regulation No 2187/93. They refer in this connection to the amount of the offers which have been made to them.

96 The Council submits that since the applicants have opted to bring an action under Article 215 of the Treaty, they must prove the real extent of the damage which they sustained and that any reference to the amount of any offer made pursuant to Regulation No 2187/93 is ruled out in this context.

97 The Commission also submits that once they have refused the offer made to them, they must prove that they satisfy the requirements of Article 215 of the Treaty.

98 In this regard, it must be noted that Regulation No 2187/93 contains strict provisions with regard to acceptance of the offer of compensation for which it provides.

99 Since the applicants have not accepted any such offer, which moreover they were not entitled to do while pursuing their action (Article 14 of Regulation No 2187/93), they derive no right from that regulation inasmuch as the offer is no longer binding on the institutions in the future (see paragraph 37 of this judgment).

100 The form of order sought by the applicants in the alternative must therefore be rejected.

Quantum of damages

101 The applicants have submitted claims for damages amounting to ECU 18 403 in the case of Mr Saint and ECU 9 342.497 in the case of Mr Murray. They have also asked for interest on the amount of compensation claimed from 19 May 1992, the date of delivery of the judgment in *Mulder II*. In the reply, the sum claimed by Mr Saint was increased to ECU 30 686. In support of their claims, the applicants have produced experts' reports according to which their real losses amount to UK £43 301 in the case of Mr Saint and IR £17 781 in the case of Mr Murray.

102 The defendants allege that the statistical reconstruction of the damage presented by the applicants shows that, contrary to their claims, they have not suffered any losses as a result of the fact that they were not allocated reference quantities. The Commission, in particular, criticizes the applicants for not having produced any figures showing the actual amount of their alternative income, for having based themselves in this connection on erroneous bases of comparison and for having unduly taken into account in their estimates interest relating to a date prior to that of the judgment in *Mulder II*. It further challenges several aspects of the experts' reports submitted and asks the Court not to take account of the estimate made by the applicants.

103 It must be observed that the parties have not yet had an opportunity to give their views specifically on the amount of any compensation appertaining to the period decided on by the Court, namely 5 August 1987 to 28 March 1989.

104 The Court considers that the possibility of settling the dispute out of court is not ruled out. Pursuant to Regulation No 2187/93, the defendants sent the applicants, on 27 and 25 January 1994 respectively, flat-rate offers of compensation through the competent national authorities. For their part, the applicants have claimed in the alternative that the institutions should be ordered to pay the flat-rate amounts so offered (see paragraphs 95 to 100 of this judgment).

105 In those circumstances, the Court asks the parties to attempt to reach an agreement in the light of this judgment on the amount of compensation for the whole of the damage eligible for compensation within twelve months. In the event of failure to reach agreement, the parties shall submit to the Court within that period their quantified claims.

Costs

106 Having regard to paragraph 105 of this judgment, the decision as to costs must be reserved.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber, Extended Composition)

hereby:

1. Dismisses as inadmissible the claims for annulment of Article 8(2)(a) and the fourth paragraph of Article 14 of Council Regulation (EEC) No 2187/93 of 22 July 1993 providing for an offer of compensation to certain producers of milk and milk products temporarily prevented from carrying on their trade;

2. Declares that the defendants are bound to make good the damage sustained by the applicants as a result of the application of Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector, as supplemented by Commission Regulation (EEC) No 1371/84 of 16 May 1984 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68, in

so far as those regulations did not make provision for the allocation of a reference quantity to producers who, pursuant to an undertaking given under Council Regulation (EEC) No 1078/77 of 17 May 1977 introducing a system of premiums for the non-marketing of milk and milk products and for the conversion of dairy herds, did not deliver milk during the reference year opted for by the Member State concerned;

3. Declares that the period in respect of which the applicants must be compensated for the losses sustained as a result of the application of Regulation No 857/84 is that beginning on 5 August 1987 and ending on 28 March 1989;

4. Orders the parties to forward to the Court, within twelve months of this judgment, the amounts to be paid, established by mutual agreement;

5. Orders the parties, in the absence of an agreement, to submit to the Court their quantified claims;

6. Reserves the costs.

Saggio Bellamy Kalogeropoulos

Tiili Moura Ramos

Delivered in open court in Luxembourg on 16 April 1997.

H. Jung A. Saggio

Registrar President